the end of justice is justice and the spirit of justice is fairness then each side should have equal opportunity to prepare its own case fully, freely and fairly before the court. To say differently, to succeed the applicant in a case of this nature must show bad faith on the part of the authorities in denying the exercise of the right of the person arrested, that is. he must show that there is on the part of the authorities a clear and deliberate attempt to obstruct or hinder the person arrested from getting the benefit of counsel to prepare his defence. Each case will therefore be considered on its own merits."

Article 5(3) was also considered in *Public Prosecutor* v. *Mah Chuen Lim and Others*[6] and with respect I agree with Syed Othman J. when he said at page 96:

"The Constitution does not prescribe the time within which the arrested person shall be allowed to consult counsel. But section 38 of the Interpretation and General Clauses Ordinance, 1948, which applies to the Constitution (see Eleventh Schedule) reads:

When no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.'

(A similar provision can be found in section 54(2) of the Interpretation Act, 1967, which applies to legislation set out in section 2).

What is 'convenient speed' would depend on the circumstances of each particular case. I do not think it is desirable to lay down the speed convenient to all cases."

In view of the above, I am of the opinion that it was unreasonable of Mr. Karpal Singh to expect to be allowed to interview Ooi on Monday, December 30, 1974, and that as in this case there had been a daylight robbery committed in the heart of the state capital involving the use of a pistol and the loss of $14,000 to $15,000 not to mention the loss of one life and that as many young men are prepared to go to any length in the pursuit of instant wealth armed robberies are therefore quite common, it was quite reasonable of the police to give facilities to Mr. Karpal Singh to interview Ooi for the first time only on January 5, 1975.

It should be added that two days later Ooi was charged in the Magistrate's Court under sections 392 and 397 of the Penal Code and that, as already stated, the preliminary enquiry into this offence had been fixed to begin on the day following arguments in this appeal.

So much therefore regarding the issue as framed by Mr. Karpal Singh. But with all due respect, I do not think that that is the real issue before the learned judge and before us. This being an application under section 365 of the Criminal Procedure Code and under article 5(2) of the Constitution, with respect I agree with Encik Lamin for the respondent that the real issue is a simple one, namely this, whether or not Ooi was lawfully detained. If so, the court should not release him; if not, the court should release him. As to this the affidavit evidence is very clear. There was an armed robbery, a seizable offence, and there was a reasonable suspicion that Ooi was concerned in that offence, and Inspector Amiruddin not only had power to arrest him without a warrant (section 23(i)(a) of the Criminal Procedure Code), he was also under a duty to do so. By the time this application was filed on January 5, 1975, Ooi had been detained by order of a magistrate, and so there was no question of his detention being unlawful.

In any event I do not think that *habeas corpus* is the right remedy for the applicant if his only complaint is that after his son Ooi's arrest his solicitor was denied immediate access to Ooi. The juxtaposition of clauses (2) and (3) of article 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of *habeas corpus*, for it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer. With respect I agree with the learned Chief Justice of Singapore in *Lee Mau Seng*[4] when he said at page 141:

"In my judgment *habeas corpus* is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police ... has been refused by the police to be allowed his constitutional right under article 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies...."

In the event I would therefore dismiss this appeal.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

GANESAN v. KALIMA

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 6, 1975]

[Alor Star — Federal Court Civil Appeal No. 151 of 1974]

Contract — Loan of money with interest — Plaintiff unlicensed moneylender — Whether money claimed is tontine money — Questions of fact — Appeal Court should not disturb findings of fact.

The appellant had brought a claim for $2,000, which he alleged he lent to the respondent. The learned magistrate dismissed the claim as he held: (1) the $2,000 was a loan with interest included and as such unenforceable because the appellant was an unlicensed moneylender; (2) the money claimed was tontine money and therefore not recoverable. The appellant's appeal to the High Court was dismissed and he appealed to the Federal Court.

Held, dismissing the appeal: it would not be right for the court which did not have the advantage of seeing and hearing the witnesses to disturb the findings of fact by the learned magistrate.

Cases referred to:-

(1) *S.M. Ameer Batcha* v. *V.K. Kunjumon* [1959] M.L.J. 59.

(2) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49 @ 50.

The following cases were also cited in argument: *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87, 92; *Chellapah* v. *Official Assignee* [1971] 1 M.L.J. 24 F.C.; *Baju Rai* v. *Liau Kim Lian* [1965] 1 M.L.J. 128, 192, F.C.; *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* [1962] M.L.J. 74, 77; *Kannappa Chettiar* v. *Scully & Anor.* [1962] M.L.J. 148; *Chellapah Rasadurai* v. *Selvadurai* [1971] 2 M.L.J. 170.

FEDERAL COURT.

A. Jayadeva for the appellant.

Natha Singh for the respondent.

Suffian L.P.: At the outset I would like to say that Wan Suleiman F.J. concurs with both judgments about to be delivered.

On July 10, 1969, the defendant Kalima d/o Valangam signed the following document (exhibit P1) saying that she had received $2,000 as an interest-free friendly loan from the palintiff R. Ganesan s/o Ramasamy:

"Subject:—

Loan of $2,000

I, Kalima d/o Valangam, i.c. No. 3930155 of No. 205 Pekan Attap, Sg. Patani, Kedah, has received the sum of dollars Two thousand only ($2,000) as a friendly loan free from interest from R. Ganesan s/o Ramasamy i.c. No. 1916860 of No. 54 Jalan Kuala Ketil, Sungei Patani, Kedah, and has agreed to repay the full amount within one year dated this day Thursday the 10th day of July, 1969.

Name:— Kalima d/o Valangam
i.c. No. 3930156 (borrower) R.T.P.

I, Abdul Kadir s/o Matharganee i.c. No. 0106940 of No. 20 Jalan Dewa, Sungei Patani, Kedah, have witnessed the payment of the above friendly loan free from interest unto the borrower.

Name:— Abdul Kadir s/o Matharganee
i.c. No. 0106940 (witness) Signature."

The defendant did not pay, so the plaintiff alleges, and on August 17, 1971, the plaintiff's solicitor wrote to her a letter (exhibit P2) as follows:

"Dear Madam,

Re: *Loan of $2,000*

We act for Mr. R. Ganesan of No. 54 Jalan Kuala Ketil, Sungei Patani, Kedah, who has instructed us to write as follows:—

Our client states that at your request our client lent you an interest free friendly loan of $2,000 to be repaid within one year.

Our client further states that it is now almost two years and despite repeated demands you have failed and or neglected to pay the said sum or any part thereof.

We have been instructed to give you NOTICE, which we hereby do that unless you pay the said sum of $2,000 to us or to our client within 7 days from date hereof, we have instructions to commence legal action against you to recover the said sum and have you condemned in costs.

Yours faithfully"

On August 23, 1971, the defendant's solicitor replied by letter (exhibit D3) as follows:—

"Dear Sir,

Re: *Loan of $2,000*

We have been handed over your A.R. Registered letter of 17.8.1971 by Madam Kalima d/o Valangam of No. 205 Pekan Atap, Sg. Patani, Kedah with instructions to reply thereto as follows:—

Our client instructs us that the loan in question was not free of any interest and also we are further informed by our client that the amount of loan was not $2,000 but $1,500 and a further sum of $500 was added as interest making a total of $2,000.

The said amount was to be paid at $50 a month and to be paid within 40 months.

So far our client has paid a sum of $1,200 leaving a balance of $800 which legally is not enforceable against our client as your client was not a licensed moneylender under the Moneylender's Ordinance.

However without prejudice to our client's protection under the Moneylender's Ordinance our client will try to settle the balance sum."

It will be noted that the defendant alleged that—

(1) the sum borrowed was only $1,500,

(2) on which she was to pay $500 interest,

(3) she has paid $1,200, leaving a balance of $800, and

(4) the plaintiff could not recover the balance as he was an unlicensed moneylender.

The defendant did not pay at all (according to the plaintiff), so on October 20, 1971, the plaintiff brought Civil Action No. 170 of 1971 in the Magistrate's Court at Sungei Patani claiming against the defendant as follows (I quote from paragraphs 3 to 6 of the statement of claim):—

"3. On the 10th day of July 1969, at the request of the defendant and in consideration of the defendant's promise to pay, the plaintiff lent the defendant $2,000 interest-free friendly loan.

4. The defendant had promised to repay the said loan within one year.

5. Although the defendant has repeatedly promised to repay the said loan the defendant has failed and or neglected to do so despite repeated demands, the last by A.R. Registered letter dated the 17th August, 1971.

6. Wherefore the plaintiff prays for judgment against the defendant for:—

(a) The sum of $2,000.

(b) Interest at the rate of 6% per annum on the decretal amount from date of judgment till realisation.

(c) Costs."

On December 27, 1971, the defendant filed her defence as follows:

"2. As regards paragraphs 3 and 4, the defendant denies that the amount of the loan in question was $2,000, or that it was an interest-free friendly loan. The defendant avers that the amount of the said loan was only $1,500 but that a sum of $540 being interest on the said loan at 3% per annum for a period of two years was added to the principal amount. The defendant paid a sum of $40 towards the said interest to the plaintiff forthwith.

3. The defendant further avers that subsequently she paid a total sum of $1,200 towards settlement of the said loan but contends that claim in respect of the balance is not enforceable in view of the provisions of the Moneylenders Ordinance 1951.

4. The defendant therefore pray that the plaintiff's claim be dismissed with costs."

It will be noticed that so far not a word had been said by the defendant that the money due from her to the plaintiff was tontine money. That came only on March 3, 1972, when she added a new paragraph to her written defence, as follows:

"5. Alternatively the defendant pleads that the plaintiff's claim is in respect of a tontine money which is not enforceable."

The trial began on July 12, 1973, and was continued a month later, when judgment was reserved. Judgment was delivered on September 12, 1973, when the learned magistrate dismissed the plaintiff's claim.

The learned magistrate considered that there were two issues: first, whether or not the $2,000 was a loan with interest included and as such unenforceable because the plaintiff was an unlicensed moneylender; secondly, whether the money claimed is tontine money and therefore not recoverable.

As regards the first issue, evidence was led by the defendant that the plaintiff, a mechanic at the Telecoms. Department, Sungei Patani, had lent money on interest to various people and the learned magistrate found as a fact that in all probability all the money lent were on interest.

As regards the second issue, there was evidence that the defendant ran a tontine consisting of 20 shares of $100 each, that 15 persons participated in it, that the plaintiff had two shares, that the plaintiff was to receive the last two payments, that on July 10, 1969, when the last payment (of $2,000) was due to be paid by the defendant to the plaintiff the defendant did not have enough money to pay the plaintiff the whole amount, that she had only $500 and that in respect of the balance of $1,500 to which interest was added at the plaintiff's behest the defendant executed the document exhibit P1. The learned magistrate found on this evidence that on a balance of probabilities the defendant did organise a tontine and that the money claimed by the plaintiff arose out of that tontine.

The plaintiff appealed — unsuccessfully — to the High Court and now appeals to this court.

The main ground of appeal is that the two defences are inconsistent. The first defence is that the money claimed is alleged to be money lent by the paintiff to the defendant. The second defence is that the money claimed is money due from the defendant to the plaintiff in a tontine. Mr. Jayadeva argues that the defences are inconsistent and cancel each other out, because if there had been a tontine, then the money due to the plaintiff is not money which had been lent by the plaintiff to the defendant but plaintiff's own money that had to be returned to him by the defendant; and the fact that the plaintiff had lent money on interest to others, did not make plaintiff a moneylender in respect of the tontine money.

Further Mr. Jayadeva says that the evidence of the plaintiff lending money to others on interest was purely oral and so it was impossible for the plaintiff to rebut that evidence. He says that the evidence regarding the tontine was also purely oral and it was impossible for the plaintiff to rebut it. He concedes that if it was tontine money, then the plaintiff cannot recover it — *S. M. Ameer Batcha* v. *V. K. Kunjumon*,[1] but he urges us to disregard the evidence relating to the tontine, as the pre-litigation correspondence never mentioned it, and it was mentioned for the first time only when the defence was amended on March 3, 1972.

With all due respect I do not think there is any merit in this appeal.

Whether or not there was a tontine is a question of fact. The learned magistrate considered the oral evidence to prove or disprove it, and I do not think that it would be right for this court, the members of which did not have the advantage of seeing and hearing the witnesses, to disturb his finding that there was a tontine of which the plaintiff was a member and that part of the money claimed was due under that tontine. So even if the learned magistrate had not found that the plaintiff had not lent money to the defendant and others on interest, he would still have to dismiss the plaintiff's claim on that ground alone.

The plaintiff shall pay the costs of this appeal, and his deposit should go to the defendant against her taxed costs.

Lee Hun Hoe C.J. (Borneo): I have read the judgment of the Lord President. I agree that the appeal be dismissed.

The plaintiff shall pay the costs of this appeal, which was alleged to have been given to respondent as a friendly loan without interest. The defence was two pronged. First, the actual sum lent was $1,500 but with interest of $540 added. $40 was paid leaving a round sum of $2,000. Up to the time of hearing $1,200 had been paid leaving a balance of $800 but which was unenforceable by virtue of the provisions of the Moneylenders Ordinance, 1951. Secondly, the sum claimed was in respect of a tontine and being tainted with illegality was unenforceable.

The evidence adduced in the Magistrate's Court indicated (1) that appellant had lent money on interest to various people, and (2) that appellant was a member of a tontine organised by respondent and was entitled to collect the last payment of $2,000 from respondent who could only pay $500. The result is that they executed a document (Exhibit P1) whereby respondent agreed to pay $2,000.

I agree with the Lord President that there is no merit in Mr. Jayadeva's contention that the two defences were inconsistent. On the evidence the learned magistrate found the sum of $2,000 was a loan with interest but that the loan was made out of money due to appellant arising from a tontine with interest added. Once the learned magistrate found that there was a tontine and the money lent arose out of it, the claim could not succeed. An appellate court would be slow to disturb a finding of fact by the lower court. The reasons were lucidly stated by Lord Diplock in *Tan Chow Soo* v. *Ratna Ammal*[2]: —

"An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

Further, it was conceded that if the money lent was a tontine money then appellant could not recover it as it was tainted with illegality and, therefore, unenforceable. That being so, the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir; Natha Singh & Co.*